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The 2016 Stormwater Bill:

An Analysis of Perceived and Real Problems with Proposed Solutions



Prepared at the request of the Honorable M. Keith Hodges, Member of the Virginia House of Delegates, 98th District

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FINAL REPORT 111716-ED

BACKGROUND

On April 20th, 2016, HB1250/SB 673 was signed into law. It will go into effect in 2017. The bill 1) directs the State Water Control Board to permit, regulate, and control stormwater runoff and erosion, 2) requires localities that operate a municipal separate storm sewer system (MS4) to administer a Virginia Erosion and Stormwater Management Program (VESMP) to regulate land disturbances, and 3) enumerates options for localities without an MS4.

The “Donut Holes”

The evolution of Virginia’s stormwater management and erosion and sediment control laws have led to the creation of two “donut holes” in which localities which chose not to administer a stormwater program must still, under certain circumstances, administer stormwater management requirements. They are found in the bill in § 62.1-44.15:27. For localities that choose not to become a VESMP authority (managing stormwater as well as erosion & sediment control), the State Water Control Board will administer a VSMP (stormwater management program) on their behalf for land disturbances of one acre or more. However, “Donut Hole #1” requires these localities, as part of their erosion and sediment control programs, to fulfill stormwater requirements for land disturbances of 10,000 square feet up to one acre. Thus, the “hole” is that despite opting for state administration of stormwater, the locality remains responsible for the “smaller” land disturbances of 10,000 square feet to 1 acre.

“Donut Hole #2” requires localities subject to the Chesapeake Bay Preservation Act to do the same for any land disturbance of 2500 square feet up to one acre in a Chesapeake Bay Preservation Area.

In other words, even when localities choose not to operate a stormwater program, they still have to enact stormwater requirements for some land disturbances.

Stakeholder concerns and varying interpretations of the bill accompanied the creation and passage of HB1250/SB673. Delegate M. Keith Hodges (R-98th District) sought the assistance of the Virginia Coastal Policy Center (VCPC) in interpreting and analyzing these concerns and separating perceived and real problems surrounding the bill. See attached letter from Del. Hodges and letter from VCPC. (Appendices A & B.)

MISSION

- To study the state of the stormwater and erosion and sediment control laws as set forth in HB 1250/SB673, which has an effective date in 2017.
- To identify attitudes and problems, both perceived and actual, surrounding the existing law and the new bill.
- To distinguish between the actual and perceived problems.
- To propose potential policy solutions clarifying perceived problems and remedying actual problems.

METHOD

- 1) **Initial Research** – VCPC reviewed HB 1250/SB673 in detail to determine the law’s functionality when it goes into effect next year. VCPC then summarized this information on the attached Programmatic Summary Sheet (PSS) (Appendix C). This PSS serves as a useful resource for quickly and clearly explaining the law, thereby helping to correct any misperceptions.
- 2) **Questionnaire** – VCPC contacted a select few stakeholders to hear and discuss, in a general sense, the attitudes and perceptions surrounding HB 1250/SB673. VCPC used this information as the basis for designing a Questionnaire (Appendix D). VCPC tested the Questionnaire in an initial interview and refined it for use thereafter.
- 3) **Finding Interviewees** – VCPC contacted previously engaged and knowledgeable stakeholders, requesting recommendations for those who could serve as interviewees to respond to the Questionnaire.
- 4) **Conducting Interviews** – In response to the previous overtures, VCPC contacted 31 stakeholders via email to schedule a phone interview with each. Ultimately 25 responded and scheduled an interview. VCPC used the Questionnaire as the framework for each interview.
- 5) **Further Research** – Throughout the interview process, VCPC conducted further research to verify and analyze the information and issues gathered from the stakeholders. VCPC integrated this information in the Common Themes from the Interviews section of this report.
- 6) **Policy Analysis** – After the interviews VCPC developed a set of policy options designed to achieve two overarching goals: 1) reduce confusion surrounding the provisions of HB 1250/SB673 and correct any perceived problems, and 2) address existing problems and criticisms of HB 1250/SB673 and the stormwater management and erosion and sediment control programs in Virginia. These are contained in the Policy Options section of this report.
- 7) **Stakeholder Meeting** – After completing a draft of this report VCPC conducted a meeting with an advisory group of stakeholders to review the paper and to solicit their comments, reactions, and suggestions.
- 8) **Presentation of Final Report** – On November 11, 2016, VCPC staff presented the final report to Delegate Hodges, providing him with an overview of its findings and conclusions. Thereafter, VCPC made the report publicly available.

COMMON THEMES FROM THE INTERVIEWS: PROBLEMS

1. GENERAL CONFUSION

SUMMARY

Many of the local government interviewees expressed difficulty in interpreting and enacting the stormwater management and erosion and sediment control programs under existing law; this confusion persists under the new bill, HB1250/SB673. Even more seasoned local experts share this opinion, several of whom found the new bill unclear and its differences from the exiting law difficult to both understand and administer. Some said the issue is due to a lack of consistency among the stormwater management, erosion and sediment control, and Chesapeake Bay Preservation Act programs, noting that there are differing standards among them.

The technical requirements of implementing these programs is yet another source of confusion. In particular, many of those interviewed cited the energy balance equation as an example of the confusing, highly technical nature of the stormwater elements of the programs. Some suggested reinstating the old erosion and sediment control MS19 standards, which were less confusing. Others pointed out that these older standards were less protective of water quality (see below).

ANALYSIS

Consistency seems to be a legitimate concern. For example, under HB1250/SB673 there are different civil penalty procedures for dealing with violators of the stormwater program and the erosion and sediment control program, creating ambiguity for localities in determining whether to take enforcement action as a violation of stormwater provisions or erosion and sediment control provisions.¹ And several interviewees noted that access to significant civil penalties is one way to hedge against non-compliance.

As for the confusing nature of the statutory language, VCPC has produced the HB1250/SB673 PSS (Appendix C) to provide a simplified overview of the structure and function of the law for the benefit of stakeholders.

Finally, it is clear from discussions with stakeholders, and a review of the requirements of the new bill and existing law, that the energy balance equation is certainly more technical than the older MS19 standards. However,

¹ Va. Code §§ 62.1-44.15:37, 62.1-44.15:58.

conservation organizations and DEQ argue that the MS19 standards were not sufficiently protective of Virginia’s waters, which is the ultimate purpose of these programs. The energy balance equation certainly has a substantial learning curve associated with it. However, while VCPC staff found the equation approachable once deciphered via the assistance of DEQ’s training materials, several interviewees noted that they did not find these materials sufficient for gaining an ongoing, operational understanding of the equation. Several interviewees noted that its use remains especially difficult in jurisdictions where such use is occasional or engineering expertise is not readily available.

2. CHANGE FATIGUE

SUMMARY

Many of the interviewees across varying stakeholder groups have described a phenomenon dubbed “change fatigue.” Generally, the Commonwealth has, in recent years, created and modified a variety of programs to protect Virginia’s waters from the potential environmental harm of stormwater and erosion. However, the frequency of the changes has hampered this mission. Many stakeholders stated that they are having trouble keeping up with each change. Many argued that there is not time to become an expert in implementing these programs and that the repeated change contributes substantially to general confusion.

ANALYSIS

There is no doubt that protecting Virginia’s waters is of the utmost importance to the Commonwealth. However, because of change fatigue, any further improvements to the protection of Virginia’s waters in the areas of stormwater management and erosion and sediment control in the near future may present implementation challenges. VCPC acknowledges change fatigue in the Policy Options section of this report; in most cases, rather than proposing large changes, we have proposed narrowly tailored solutions aimed at making the current stormwater management and erosion and sediment control programs clearer and more easily implementable.

3. FEAR OF FEDERAL INTRUSION

SUMMARY

Some of the localities that have opted out of administering a VESMP have explained that they fear becoming a VESMP authority would allow EPA the ability to “leapfrog” over DEQ and regulate and enforce action at the local level directly. Interviewees base this belief in part on the inclusion of the “VSMP” in the language of the Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges of Stormwater from Construction Activities (“Construction General Permit”).

ANALYSIS

The Construction General Permit was designed as part of Virginia’s obligations under the Clean Water Act.² It functions as a part of Virginia’s Stormwater Management Program.

Beyond the EPA review process required for VPDES permits which would occur at the federal-state level, it is unlikely that EPA has the means for taking additional substantial enforcement action against a locality merely because of a locality’s administration of the state-based (not Clean Water Act-based) stormwater management and erosion and sediment control program and reference to or incorporation of the state program in the federally delegated VPDES permit. EPA’s jurisdiction remains limited to that established by the federal Clean Water Act. The VESMP is a creation of state law, and as such, does not modify or extend EPA’s authority directly over VESMPs.³ State specific actions taken under state authority would not empower EPA to take enforcement action where EPA was otherwise unable, nor restrict EPA’s ability to enforce its own program.

EPA can, however, engage in direct enforcement against dischargers under the Clean Water Act including a discharger in a jurisdiction operating a state stormwater program like the VESMP. EPA is empowered to enforce the Clean Water Act against individual violators irrelevant of Virginia’s actions regarding VESMPs. 33 U.S.C.A. § 1319(a)(1-3) of the Clean Water Act provides that the EPA Administrator can give a warning, order, or eventually file a civil action when a party violates a condition or limitation relating to the Clean Water Act pollution discharge program.⁴ Similar actions can also be taken against a State if

² 9 Va. Admin. Code 25-880-70.

³ The legal relationship between EPA and DEQ is similar to the relationship between DEQ and a VESMP locality. In both relationships a subsidiary administers a program in compliance with a higher authority.

⁴ 33 U.S.C.A. § 1319(a)(1-3) (West).

the problem is widespread.⁵ EPA considers any point source discharge into the waters of the United States to fall under the Clean Water Act pollutant discharge program.⁶

VCPC conducted a brief review of EPA enforcement activity under the Clean Water Act and found eight instances of the EPA taking enforcement action against localities with relation to stormwater discharges since 2006.⁷ All of these actions ended in settlements. None of these actions took place in Virginia. However, this history would at least indicate that EPA already possesses sufficient authority to initiate enforcement against a discharger, which can include a locality, when the discharger violates the NPDES program.

Whether a locality assumes the role of a VESMP authority or not is unrelated to EPA's ability and authority in this area.

4. LACK OF RESOURCES

SUMMARY

A number of rural localities concerned with the “donut holes” made clear in interviews that they do not have the financial or personnel resources to handle the stormwater requirements for the smaller land disturbances included in the “donut holes.” They also indicated that these smaller land disturbances can be the most common.

In these localities, a single public employee will often perform multiple roles. Interviewees argue that plan review and site inspection for stormwater take up time that these public employees simply do not have.

In addition, these employees may lack the necessary expertise to properly understand or review the statutory requirements, necessitating consumption of time to attend the necessary training. Thus, to address the requirements that the “donut holes” impose, these localities argue they would have to hire more staff, likely an engineer, or pay for contract assistance, which they cannot do without increased revenue.

It is the localities with a low frequency of land development that feel most financially burdened by the bill. These local representatives stated in interviews the need to secure a vehicle and gasoline to investigate BMPs and conduct site inspections or to hire new staff to conduct plan review and other administrative responsibilities. The localities with more frequent disturbances can offset some

⁵ *Id.*

⁶ <https://www.epa.gov/npdes/npdes-frequent-questions#pane-5>.

⁷ <https://cfpub.epa.gov/enforcement/cases/index.cfm>.

of these costs through use of the bill's fee schedule provisions. However, several interviewees noted that the current fee schedule is insufficient for compensating localities for the work necessary under the program. Even if the fee schedule performed better for localities, the localities with few land disturbances have limited instances from which to recover costs. As such, some local representatives conclude that there is a need to generate new revenue to meet the requirements of the bill. There does exist an avenue for such generation in the bill in § 62.1-44.15:28(9)(B) which allows a locality to increase the fees to cover costs.

ANALYSIS

The size of this burden on these localities depends on the choice they select from § 62.1-44.15:27. The “donut holes,” as discussed earlier, are found in § 62.1-44.15:27(B)(3). Localities could offset part of this burden of regulating stormwater as required under the “donut hole” provisions by selecting option 2 under § 62.1-44.15:27(B)(2), in which the locality becomes a VESMP authority but DEQ takes on plan review responsibilities and provides recommendations to localities for compliance, or option 3 under § 62.1-44.15:27(B)(3), in which the locality only operates a VESCP (i.e., only erosion and sediment control). Option 3 would not alleviate the time and cost burden of stormwater site inspections and plan review for the “donut hole” activities; however, these localities are already performing site inspections for the erosion and sediment control program under existing law.⁸ It is reasonable that stormwater inspections and erosion and sediment control inspections could be performed simultaneously, though added time would seem necessary. While the lack of resources is clearly a concern for some localities, it is unclear how much of a burden the additional inspection time would be for these inspectors given the infrequency of land disturbances.⁹

A locality may need to generate revenue to fulfill obligations under this program. This may be difficult for some localities. Local revenues are typically sourced from property taxes. VCPC in its work for other projects has encountered areas in Virginia which are likely covered by the “donut holes” where property values are falling in the wake of sea level rise and other issues. As such, a property tax rate increase in these areas may not be a viable option for revenue generation. To avoid this issue, other revenue raising options could be considered such as a stormwater utility fee, or a fee for BMP installation or land disturbances, or utilization of the provisions of § 62.1-44.15:28(9)(B).

⁸ See 9 Va. Admin. Code 25-840-40, 60.

⁹ It is important to note that the bill does not mandate that an engineer perform these inspections. See *id.*

A locality which chooses to administer a VESMP could further reduce time and cost burdens by sharing a plan reviewer with neighboring VESMPs per § 62.1-44.15:27(I).

5. NEED FOR IMPROVED TRAINING

SUMMARY

Some of those interviewed expressed a need for improved training from DEQ. More specifically, some have found the DEQ training sessions lacking in detail, particularly regarding the energy balance equation; others expressed a need for “hands-on” training. In contrast, others stated that those who go through DEQ’s training program are more than prepared to handle the responsibilities established by the new bill.

ANALYSIS

VCPC analysis of the DEQ materials revealed that they were fairly straightforward, consistent with the opinions of a number of local program managers and engineers. That, however, doesn’t solve the local government expressed need for additional or improved assistance.

6. FUTURE LIABILITY OF LOCALITIES

SUMMARY

A few representatives of localities as well as a few regional stakeholders expressed concern about locality liability when there is a failure to comply with stormwater management BMP maintenance requirements after installation. For example, when a bioretention pond is installed, the owner of the land is responsible to maintain it in perpetuity.¹⁰ The obligation to maintain that structure runs with the land but a number of local government representatives expressed concern about the cost of monitoring and correcting maintenance requirements later down the line when a compliance issue arises (e.g., a BMP fails and the landowner disappears). Certain localities have, according to interviewees, started requiring a revolving letter of credit from land disturbers to secure the locality against the cost of future lapses in compliance. These interviewees explained that since this obligation exists in perpetuity, these letters of credit are going to be quite large in value, increasing the cost of a land

¹⁰ Va. Code § 62.1-44-15:27(G)(3).

disturbance, and discouraging land development. Other interviewees did not agree that liability risks were a large problem, citing the ability to bring an enforcement action and place a lien against the property.

ANALYSIS

DEQ has a model BMP maintenance agreement that it has distributed to localities as a template to ensure all parties are aware of their responsibilities. (See Appendix E; note that DEQ is currently revising this agreement.) This agreement, like other such agreements, does not guarantee protection for a local government and researching site ownership and pursuing enforcement action can be costly and time consuming. Many interviewees from rural localities noted that they do not have an attorney on staff and must hire one for such proceedings.

7. TOO MUCH REGULATION

SUMMARY

Several interviewees expressed concern that the number of regulatory and statutory requirements for protecting Virginia's waters are duplicative, cumbersome, and oppressive. There are just far too many standards for them to track and implement while still encouraging responsible land development, they argue. Some have expressed the opinion that the Chesapeake Bay Preservation Act (CBPA), in particular, is redundant now that HB1250/SB673 addresses both water quantity and quality.

ANALYSIS

The sheer number of differing attitudes, interpretations, and opinions surrounding these programs lends credence to the fact that this area of the law is complicated for all involved. To survey the laws and regulations for the purpose of streamlining them is a large project in and of itself that is far beyond the scope of this report.

However, given the number of interviewees who suggested the redundancy of the CBPA and related regulations,¹¹ VCPC examined their function within the context of Virginia's stormwater policies. In summary, the Bay Act does not appear to be an area of the law that is, on its face, redundant or easily retracted without substantial consequence to the operation of the law in areas such as zoning, land use, subdivisions, minimizing land disturbance, minimizing impervious cover, septic tanks, agriculture, stream bank erosion, low impact development, living shorelines, and land buffers around waterways.

¹¹ 9 Va. Admin. Code 25-830.

Many of these provisions are unique to the CBPA. While the overarching purpose of the CBPA is water quality protection, it is not merely water quality protection from proper stormwater management. It includes protecting critical natural resources protection (e.g., of wetlands), preservation of habitats (e.g., minimization of tree removal), and groundwater protection (e.g., septic system standards). These provisions are not redundant within the existing regulatory schema.

Some interviewees still point to provisions such as the Resource Protection Area (RPA) 100ft buffer as an example of redundancy between stormwater management and the CBPA. The RPA 100ft buffer serves the purpose of filtering sheet flow unrelated to land disturbances, before or after construction. Thus, as noted by several interviewees, even when a land disturber follows all the stormwater provisions, the CBPA continues to uniquely serve its purpose to “protect and improve the water quality of the Chesapeake Bay, its tributaries, and other state waters.”¹²

8. INEFFICIENT OUTCOMES

SUMMARY

A common criticism of the bill is that the stormwater provisions can require costly initiatives for little benefit to Virginia’s waters. These cases are seen most often in rural areas. For example, if someone in a rural locality constructs a long driveway,¹³ they have likely triggered the erosion and sediment control and stormwater requirements. As such, the locality must perform a plan review and/or at least conduct site inspections. Meanwhile, this landowner may have acres and acres of undeveloped land available for absorbing and filtering any runoff. Interviewees argued that for small localities with limited staff, conducting a plan review and site inspection for such a case feels like a waste of time. The increased impermeable surface of the driveway is negligible in comparison to the surrounding permeable land, they argue. The law, under its current schema, does not allow for flexibility in these situations.

Others have identified inefficient outcomes for the required installation of engineering solutions and BMPs. The current Runoff Reduction Method requires a reduction of total phosphorous by 10%-20% for redevelopment

¹² *Id.* at § 30.

¹³ There does exist an exemption for detached single family residential construction. However, a single lane drive is not clearly stated for inclusion within the exception and may not be for a single family residence.

projects,¹⁴ even when there is no increase in impervious cover.¹⁵ Some engineers mentioned that this reduction is particularly arduous for smaller construction projects, such as building a driveway. They conclude that these situations do not justify the potential substantial cost to install certain BMPs just to meet this reduction requirement. They argue that the 10-20% reduction in total phosphorous is an insignificant amount at these smaller sites in comparison to the high costs of achieving it. However, they did not mention or consider the potential cumulative impact of numerous loadings from numerous smaller sites.

ANALYSIS

Although the current runoff reduction method takes account of permeable land surrounding the land disturbance, it does not leave room to avoid the formal process of plan review and site inspection. However, localities can at least avoid the burden of plan review by selecting option 2 under § 62.1-44.15:27(B)(2) whereby the locality becomes a VESMP but DEQ conducts the plan review. Per § 62.1-44.15:34, the locality need only determine that any submitted plan is complete and forward it to DEQ for review under this option.

The repeated mention of these inefficiencies seems to emerge from the desire of smaller localities to reduce their burden under the bill wherever possible. Recognition of these inefficiencies in the stormwater program policy may serve to solidify support generally for the program.

¹⁴ 9VAC25-870-63(A)(2).

¹⁵ [http://www.vwrrc.vt.edu/swc/documents/GM16-2001%20Virginia%20Runoff%20Reduction%20Method V3.pdf](http://www.vwrrc.vt.edu/swc/documents/GM16-2001%20Virginia%20Runoff%20Reduction%20Method%20V3.pdf).

COMMON THEMES FROM THE INTERVIEWS: POSITIVES

1. THE ONE-STOP SHOP

SUMMARY

In interviews for this report, a number of interviewees emphasized an important function of HB 1250/SB673. Generally, land developers and contractors benefit greatly from a system in which they can cover all of their legal obligations for a land disturbance by visiting the relevant office at the local level. A locality's offices are familiar with the local land and policy aims, and, according to some interviewees, more approachable and responsive than State agencies. When a locality can serve as a one-stop shop there is a de facto increase in ease of compliance, and the locality maintains a greater control over the development happening within its borders.

When land developers have to work with state agencies in addition to a locality, it adds to the complexity of any project. Interviewees noted that sometimes the decisions at the state level conflict with the decisions of the locality, causing delays. Furthermore, state agencies, being further removed from the situation on the ground, cannot as easily "fast track" projects that are important to a particular locality.

Although localities can transfer plan review responsibility to DEQ, others may choose to implement the program themselves for increased control and the encouragement of development.

2. CONSOLIDATION

SUMMARY

Many stakeholders are pleased that HB 1250/SB 673 consolidates the stormwater program with the erosion and sediment control program. Conceptually, this improves understanding and clarity for the localities and regulated community.

POLICY OPTIONS

1. DEQ COACHING

Many of the local staff operating stormwater management programs and/or performing site inspections for the stormwater program have expressed confusion regarding performance of their duties. Although DEQ provides training, many of these same people shared that this training has not been sufficient; they are looking for first-hand experience in the process from start to finish, available at the regional or local level, along with a more detailed training program in particularly confusing areas such as the energy balance equation. For those localities which only have a couple of land disturbances each year that trigger the stormwater requirements, application of the rules is difficult due, in part, to the infrequency of projects. A few interviewees mentioned that having someone from DEQ available regionally or locally to work with them from start to finish on a land disturbance would provide them with the necessary clarity of implementation for some of the more confusing areas of the program. Assistance with use of the energy balance equation is one area of particular importance. Thus, one policy option is to have DEQ provide an on-the-ground (i.e., located regionally or locally) coach or consulting professional or engineer with advisory/assistance duties to one or more locality.

Additionally, DEQ could produce a comprehensive guidebook for stormwater management inspired by the erosion and sediment control “green book,” which many smaller localities have found valuable in implementing the erosion and sediment control program. Developing this guide could help reduce the burden on DEQ to provide ongoing assistance over time.

<i>Pros</i>	Localities improve their understanding of the program and build a closer working relationship with DEQ. They get to see what steps to take, how to use the various tools such as the energy balance equation, and what does and does not meet DEQ's standards for plan review. Having DEQ work with the local program managers step-by-step at the regional or local level provides ease of access and allows DEQ to quickly correct issues and guide localities with practical, hands-on experience.
<i>Cons</i>	Such a program may require an increase or reallocation of DEQ funding to hire and train the DEQ coaches. Furthermore, as staff changes in the locality, the process would have to begin anew.
<i>Problems Addressed</i>	General Confusion, Need for Improved Training
<i>Implementation</i>	<ul style="list-style-type: none"> • DEQ internal action establishing such a program • Legislation directing DEQ action in conjunction with this policy option • Possible additional funding for DEQ

2. HANDS-ON TRAINING WITH REGIONAL ORGANIZATIONS

In order to meet the need for real world experience, another option is for regional organizations, such as the Virginia Association of Counties (VACO), planning district commissions (PDCs), or the Soil and Water Conservation Districts, to bring together local program managers and inspectors from a region to walk through different phases of applying the stormwater management requirements to land disturbances occurring in the region. These regional organizations could solicit from localities proposed land disturbances to serve as examples and organize “field trips” to these sites to help the local staff learn from one another, allowing less experienced staff to shadow more experienced staff. This would help relieve DEQ of the burden of additional training, though DEQ participation would be valuable. DEQ sanction of this hands-on training by a regional organization would also be a valuable element, as this would better ensure accuracy.

Authorization does exist for a VESMP authority to enter into agreements or contracts with Soil and Water Conservation Districts, PDCs or other public or private entities to carry out or assist with plan review and inspections.¹⁶

Any entity taking on this responsibility may need additional revenue to fulfill its obligations.

<i>Pros</i>	Localities get the “hands on” experience they need. Moreover, the regional nature of this approach can highlight the needs of the area, with localities cross-pollinating education and experience.
<i>Cons</i>	Regional organizations would have to have a continuous commitment to this program to continue to educate localities as staffing changes. Additionally, for smaller localities in which one public servant has many roles in the government, taking a few days to visit another locality delays other work; thus, the effectiveness of the training would be critical. Even with training, problems and questions may still arise when enacting this program; thus, this policy is less effective than the DEQ coaching option in which DEQ is directly available for questions and assistance in regards to this program.
<i>Problems Addressed</i>	General Confusion, Need for Improved Training

¹⁶ Va. Code § 62.1- 44.15:27(I).

Implementation

- A willingness from regional groups to assume this role
- Utilization of existing authority
- Possible additional funding for any entity assuming this responsibility

3. STATUTORY AND REGULATORY REVIEW FOR CONSISTENCY

General confusion is caused, in part, by the differing standards between various water quality programs and what are perceived as redundant statutes and regulations. This could be mitigated, in part, by a comprehensive review of these statutory and regulatory provisions and the establishment of consistent standards across the various programs. For example, a uniform square footage threshold could be established for the Bay Act, stormwater management, and erosion & sediment control laws; uniform enforcement procedures and penalties could be established for the same.¹⁷ JLARC would be well equipped to handle such a project, looking at operation ease as well as the water quality implications of any such changes.

<i>Pros</i>	The localities gain clarity in the function of these programs, and a uniform, streamlined system produces greater efficiency at the local level. This could also be used to reduce change fatigue in the long run; by reviewing programs in the aggregate the Commonwealth can ensure it has developed a uniform policy that is not likely to require modification in the near future.
<i>Cons</i>	This review would require some substantial legal and legislative investment.
<i>Problems Addressed</i>	General Confusion, Change Fatigue, Too Much Regulation
<i>Implementation</i>	<ul style="list-style-type: none"> • Direct JLARC to undertake the study or seek a partnership or contract with another policy and legal analytic organization for the same

¹⁷ The development process for HB1250/SB673 did not address unifying the regulatory thresholds and was unsuccessful in resolving differences among the enforcement procedures for stormwater management and erosion and sediment control violations.

4. ESTABLISH EXCEPTIONS FOR ISOLATED LAND DISTURBANCE PROJECTS

Many of the rural interviewees expressed frustration about the burdensome nature of the stormwater management and erosion and sediment control requirements. They have identified situations in which they argue plan review was unnecessary, or the energy balance equation required expensive measures they did not believe were necessary or worth the cost. For smaller land disturbances, the creation of a set of exceptions to the current schema or the development of a general or simplified permit containing specific parameters may solve these problems while protecting water quality. For example, the “donut hole” land disturbances of 2,500 square feet to an acre for Chesapeake Bay Preservation Act jurisdictions, or specific situations like driveway construction on a large forested parcel with no nearby waterway, could be governed by a general permit, permit by rule, or agreement in lieu of a plan that skips the formal plan review and establishes certain required BMPs or alternative criteria that also avoids the use of the energy balance equation.

These options could be limited to localities that choose to become VESMPs to incentivize participation in the program.

<i>Pros</i>	Exceptions would improve efficiency for the locality, and make development requirements less cumbersome for the land disturber. Reducing complexity would likely improve compliance with the program.
<i>Cons</i>	The plan review provides more information, and thus more certainty about the impact of a land disturbance to Virginia’s waters. This option trades time invested in training and plan review, for less information and clarity. Furthermore, if the exceptions are too broad, the protective benefit of these programs is lost.
<i>Problems Addressed</i>	Lack of Resources, Too Much Regulation, Inefficient Outcomes
<i>Implementation</i>	<ul style="list-style-type: none"> • Legislation modifying the bill to create these exceptions • Legislation directing DEQ to, or an agreement with DEQ to, develop a set of appropriate exceptions followed by regulatory implementation

5. INCREASE DEQ RESPONSIBILITIES AND LEADERSHIP

Many localities have expressed concern about their future obligations to monitor and enforce the maintenance of installed engineering solutions and BMPs. For the smaller localities, enforcement action may be costly and difficult due to a lack of legal staff. To remedy this concern, the legislature could create a fund into which those constructing a BMP would pay. The fund would cover the costs of future maintenance in instances where a local government had to take enforcement action but lacked the dollars to do so.

In the alternative, 1) the State could bear the time and cost of these responsibilities; the current option under § 62.1-44.15:27(B)(2) could include enforcement responsibilities for the State, leaving only inspection and monitoring duties for the locality; or 2) there could be a system where the locality contracts with DEQ to perform the enforcement responsibilities pursuant to § 62.1-44.15:27(I).

Finally, protections for local governments could be further enhanced by a statutory provision requiring the violator to bear the responsibility of any and all enforcements costs, including reasonable attorney fees.

DEQ could also assume more responsibilities from the various localities that chose not to administer a VESMP, to eliminate and/or reduce the burden of the “donut holes.” This could be achieved via any of these options: 1) make DEQ responsible for all stormwater plan review for localities that do not become a VESMP; 2) make DEQ responsible for operating in full all the VESMP duties for localities that wish to opt out of both programs; 3) make DEQ responsible for the work the opt-out localities object to most, i.e., the energy balance equation and runoff reduction spreadsheet, but leave the rest of the stormwater work in the “donut holes” to the localities. In any of these options localities or regional DEQ offices could be responsible for site inspections.

Pros	The smaller localities gain security for the future, and save time from initiating enforcement actions, and/or performing stormwater work in the “donut holes.” This is particularly beneficial to localities that cannot afford to have an attorney or plan reviewer on staff.
Cons	This does not alleviate the burden on localities of monitoring the BMPs well into the future. The cost of this program is relatively unpredictable in regards to BMP maintenance depending on private compliance with the BMP maintenance responsibilities. There is also a potential efficiency loss if DEQ takes on the complete administration of the runoff reduction, stormwater plan review and/or erosion and sediment control requirements. Even if the work is performed at the DEQ regional offices, localities will still likely have greater familiarity and experience with the construction site. Furthermore, putting more responsibility on DEQ pulls this program further away from making localities a “one stop shop.” Finally, DEQ might need greater funding to fulfill these new obligations.
Problems Addressed	Future Liability of Localities, Lack of Resources
Implementation	<ul style="list-style-type: none"> • Legislation creating a state fund to cover the cost of maintaining unmaintained BMPs • Legislation amending the bill to require the state to perform monitoring duties and/or initiate enforcement actions against those who fail to maintain BMPs • Legislation establishing provisions for localities to contract with DEQ to perform enforcement responsibilities for failed BMPs in their locality • Legislation requiring DEQ to step in and enforce BMP maintenance requirements after localities have taken certain steps to determine ownership and to obtain compliance

6. CERTIFIED THIRD PARTY PROFESSIONALS

To alleviate the burden of plan review on localities, DEQ could establish a stormwater certification program under which trained and certified third-party professionals, including engineers, could be legally empowered to perform all of the stormwater program responsibilities, from plan reviews to installation approvals to compliance inspections, without the locality being required to oversee their work.

<i>Pros</i>	Localities would have a reduced burden in enacting this program. The Commonwealth has successfully allowed third parties to perform compliance work in a variety of other areas.
<i>Cons</i>	Government, whether at the state or local level, loses some control over the actual process of water quality protection. The governmental primary oversight shifts from the project itself to oversight of a designated, certified professional.
<i>Problems Addressed</i>	General Confusion, Lack of Resources
<i>Implementation</i>	<ul style="list-style-type: none"> • Legislation directing DEQ to establish a stormwater certification program for third-party professionals

7. MAJOR SUBSTANTIVE OVERHAULS

There has been significant work on the stormwater management and erosion and sediment control programs over the years, with the most recent changes reflected in the bill discussed at length in this report. The extent of these changes suggest that one solution to the perceived and actual problems is the development of “overhauls” which provide a more straightforward and more easily administered set of programs in the long run. Three potential overhauls are:

1. Establish a new system that parallels the federal and state wetlands programs that relies on the tiered concept of avoidance, minimization, and compensation. For stormwater, for example, the program could focus on the avoidance of production of stormwater, i.e., the utilization of a no-discharge goal. If no-discharge is not possible, the focus shifts to the next tier, a requirement of minimizing the production of stormwater and the creation of any pollution. When generation of stormwater or pollution occurs, compensation follows.
2. Regionalize the stormwater management and erosion and sediment control programs, removing the fundamental ‘one size fits all’ theme that underlies them today. Regionalization could incorporate removal of the “donut holes” and might allow for rural jurisdictions with little development and lots of open space to manage stormwater in new and innovative ways; for example, such jurisdictions could create under specified conditions stormwater “banks” which could include permanent and inviolate riparian buffer establishment in lieu of implementing the current stormwater management requirements. Such regional programs would incorporate the natural resource and development attributes of the region. All such regional programs would need to meet standards established by DEQ.

Pros

Overhauls could establish greater simplicity, greater flexibility, and even greater, at the same time, greater consistency. All of the Overhauls remove the “donut holes” identified at the onset of this report.

Cons	Any overhaul will necessitate setting aside sufficient time to design, develop and institute the programs and will heighten change fatigue. Overhaul 1. would require substantial funding to implement and would reduce efficiency by moving plan review further away from the location of the land disturbance. Overhaul 2. and 3. could prove ineffective in protecting water quality if standards are not designed strictly and compliance and enforcement are not actively pursued. Funding impacts would need to be determined.
Problems Addressed	General Confusion, Fear of Federal Intrusion, Lack of Resources, Need for Improved Training, Too Much Regulation, Inefficient Outcomes
Implementation	<ul style="list-style-type: none"> • Legislation to enact any of the above options.

COMBINED POLICY OPTIONS

Although the policy options described in this report can function independently, many can, and likely should, be combined with other options to address a wider variety of the problems VCPC has identified through its investigations and composition of this report.

COMBINATION I: ADDRESSING PROBLEMS WITH MINIMAL ADDITIONAL ‘CHANGE FATIGUE’

Option 1) DEQ Coaching, Option 5) Increasing DEQ Responsibility and Leadership, and Option 6) Certified Third Party Professionals could be combined to solve numerous enumerated problems while preserving the fundamental elements and character of the existing program as enacted. An interactive and accessible DEQ with expanded training would better prepare localities to learn and administer the stormwater program pursuant to the “donut holes.” By moving BMP enforcement costs to the State, and allowing third-party professionals to perform plan review, etc., localities would be relieved from BMP enforcement work and costs as well as the work that the third-party engineers could undertake. However, increased funding may be needed to bolster DEQ staff and cover BMP enforcement costs.

COMBINATION II: IMPROVING LOCAL FLEXIBILITY

Option 3) Statutory and Regulatory Review for Consistency and Option 4) Establish Exceptions for Isolated Land Disturbance Projects could be combined to maximize the operational ease at the local level. Reviewing the statutes and regulations to improve consistency and establishing new exceptions would streamline much of the confusion for localities. However, the benefit of this combination is limited by the number of exceptions created. If too many exceptions are established, it may jeopardize water quality and create confusion and thus potentially impact compliance negatively. Furthermore, the process for establishing these exceptions, and improving consistency may take some significant time to complete.

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APPENDIX A



M. KEITH HODGES
2300 VIRGINIA STREET
URBANNA, VIRGINIA 23175
NINETY-EIGHTH DISTRICT

COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

COMMITTEE ASSIGNMENTS:
GENERAL LAWS
COUNTIES, CITIES AND TOWNS
HEALTH, WELFARE AND INSTITUTIONS

March 14, 2016

David K. Paylor
Virginia Department of Environmental Quality
629 E. Main Street
Richmond, VA 23219

Dear Director Paylor,

During the 2016 session of the Virginia General Assembly, the House Agriculture, Chesapeake and Natural Resources Committee considered HB1340, which I introduced. I am writing this letter asking the Department of Environmental Quality to participate in a work group that I am forming to address issues addressed by HB1340.

The work group will discuss the administration of stormwater management and erosion and sediment control requirements. This work group will include a variety of stakeholders involved in these issues. Since the effective date of HB1250 and SB673, which passed the 2016 General Assembly and address issues raised by HB1340, is not until July 1, 2017, the work group will have time to meet and make any desired recommendations for statutory amendments during the 2017 session of the General Assembly. I believe the Department's expertise on this subject will be a valuable asset to the work group.

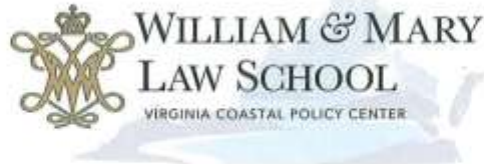
I appreciate your attention to this request.

Respectfully,

M. Keith Hodges
Delegate, 98th District

cc: The Honorable Tony O. Wilt, Delegate, 26th District
The Honorable Danny Marshall, III, Delegate, 14th District

APPENDIX B



April 26, 2016

The Honorable M. Keith Hodges
Delegate, 98th District
230 Virginia Street
Urbanna, Virginia 23175

Dear Delegate Hodges:

It was a pleasure to meet with you and Lewie Lawrence to discuss your concerns surrounding the administration of Virginia's existing stormwater, erosion and sediment control, and Chesapeake Bay Preservation Act programs and your desire to examine new solutions that work for our coastal communities and resources.

As discussed, it is our understanding that you would like to have the Virginia Coastal Policy Center (VCPC) conduct a study and analysis of the existing programs and identified problems, followed by suggested policy and/or legislative solutions. The process we propose for doing this study and analysis is as follows:

- 1) The VCPC will conduct a series of interviews with targeted individuals seeking to discern commonly perceived problems with these programs. The list of targeted individuals will include state agency staff, local government leaders, stakeholder NGOs, and experts from the private sector.
- 2) In parallel with the interviews, the VCPC will develop a series of white papers summarizing the current state of the law, regulations and guidance concerning these programs.
- 3) Upon the conclusion of the interviews, the VCPC will supplement the legal analyses noted above with complementary documents identifying the perceived and actual problems, linking them to the law, regulations, and policies that govern in Virginia. The VCPC will share the content of this problem document with you and a small set of viewers so as to ground truth the conclusions reached by the VCPC.
- 4) The VCPC will produce a set of policy and/or legislative options for possible resolution of the perceived and actual problems. It will invite a workgroup of interested parties to participate in a roundtable discussion to solicit their reactions and responses to the proposed resolutions. The workgroup will first receive an overview of the "state of the law" white papers noted above so that all participants are equally educated. The problems and solutions roundtable discussion will follow. To help ensure our ability to provide an informed, researched set of recommendations to you, VCPC will convene, facilitate, and manage the workgroup.

- 5) After the roundtable discussion, the VCPC will analyze the contributions provided by the roundtable participants and prepare a final document containing potential recommendations and options. VCPC will provide the roundtable with an opportunity to review the final document for substantive error, the need for major changes, etc., prior to its completion and delivery to you. VCPC will not seek a signatory approval of the final document from all participants; rather it will seek to ensure that priority positions, concerns, and solutions are part of the final document.

Throughout the process, the VCPC will keep you educated and informed of the work and its progress.

Our goal is to complete the work for you no later than mid-November 2016. If we can finish it on an earlier schedule, we will do so. If this concept as proposed in this letter is one that will suit your needs, the VCPC will develop a timeline for the work and share it with you. We anticipate the research and interviews to occur throughout this summer.

While we had discussed with you the need for reimbursement for the time and expenses incurred by VCPC for this project, we have determined that the Commonwealth and your goals would be best served if the VCPC conducted this work within the framework of its existing operational budget.

We would very much appreciate your reviewing this suggested process and would welcome the opportunity discuss it with you and answer any questions or respond to any suggestions you may have. If you or your office could follow up with Roy Hoagland, the VCPC Co-Director who will serve as the lead for this work, we would be grateful. We can then schedule a follow up call at a mutually convenient time. Roy can be reached at 804.221.0404 or rhoagland@wm.edu.

We have copied Lewie Lawrence of the Middle Peninsula Planning District Commission so that he, too, is aware of our proposal.

Sincerely yours,


Elizabeth A. Andrews, Director



Roy A. Hoagland, Co-Director

Copy: Lewie Lawrence, MPPDC

Virginia Coastal Policy Center, William & Mary Law School Patrick Galt House, PO Box 8795, Williamsburg VA 23187

APPENDIX C

Programmatic Summary Sheet

VCPC's Guide to HB1250/SB673 ¹⁸

When Does This Law Become Effective?

- July 1, 2017, or 30 days after the State Water Control Board (“Board”) establishes the necessary regulations, whichever comes later. [Enactment Clause (10)]

Without Approval It is Illegal To:

- 1) Discharge waste, or any dangerous or harmful substance into state waters
- 2) Dig in a wetland
- 3) Change the state waters physically, biologically, or chemically
 - a. To harm any form of life, or the use of the water, by changing the water
- 4) Engage in any of the following in Wetlands:
 - a. Draining that significantly degrades wetland acreage or function
 - b. Filling or dumping
 - c. Permanent flooding or impounding
 - d. Any action that substantially alters or degrades wetland acreage or function
- 5) Discharge stormwater into state waters (applies to MS4s and land disturbing activity) [§ 62.1-44.5 (A)(1-5).]

Land Disturbances: When Do You Need Approval and What Does Your Plan Need to Cover?

Not in a Chesapeake Bay Preservation Area [§ 62.1-44.15:34 (E)(2)(a,b).]

- For land disturbance of 1 acre or more:
 - (1) soil erosion, (2) water quantity, and (3) water quality requirements
- For land disturbances greater of 10,000 sqft or more:
 - (1) soil erosion and (2) water quantity requirements

¹⁸ Available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+CHAP0758>.

In a Chesapeake Bay Preservation Area [§ 62.1-44.15:34 (E)(3)(a,b), 62.1-44.15:58(A).]

- For land disturbances of 2,500 sqft or more (except single-family detached residential structure):
 - (1) soil erosion, (2) water quantity, and (3) water quality
- For land disturbances of 2,500 sqft or more for single-family detached residential structures:
 - (1) soil erosion and (2) water quantity (locality may add quality if they wish)

Exceptions: You Don't Need Approval For: [§ 62.1-44.15:34 (F)(1-11), § 62.1-44.15:55 (F)(1-11)]

- 1) Minor land disturbances– home gardens, landscaping, etc.
- 2) Installation, maintenance, or repair of individual service connection; underground utility line under existing hard surface; and septic tank or drainage field– unless included in a plan for land-disturbing activity related to construction of a building
- 3) Mining, gas, or oil operations and projects permitted under Title 45.1
- 4) Listed agricultural activities (e.g., tilling, planting, or harvesting; livestock feeding; agricultural engineering including: terraces and dams; strip cropping; and land irrigation)
- 5) Installing posts and poles (e.g., signs, utility poles, etc.)
- 6) Shoreline erosion control projects
- 7) Repairing or rebuilding structures and facilities of railroad companies
- 8) Emergency situation– land-disturbing necessary to protect endangerment to human health or environment (VESMP authority needs to be notified)
- 9) Discharges into a sanitary or combined sewer not from land disturbance

Other Exceptions: When Your Plan Only Needs to Comply With Soil Erosion Requirements and Not Water Quality and Quantity [§ 62.1-44.15:34 (G)(1-3), § 62.1-44.15:58(A).]

- 1) Activities under state or federal reclamation programs (i.e., turning abandoned property into ag or open land use)
- 2) Maintenance within original construction boundaries of project, including paving an existing road, and reestablishing associated ditches and shoulders
- 3) Discharges from land disturbance into sanitary or combined sewer

What Do Localities Need To Do?

Generally

- Establish a VESMP or VESCP:
 - *Have an MS4? You Must Establish:*
 - VESMP to control sediment erosion, sediment deposition, **quantity and quality** of runoff from land disturbances to protect properties, waters, and other natural resources [§ 62.1-44.15:24; § 62.1-44.15:27 (A).]
 - *Don't have an MS4? You Can Establish:*
 - *a VESMP, a VESMP with the help of the DEQ, or a VESCP*
Note: A VESCP can only be chosen by a locality that does not operate an MS4 to control sediment erosion, sediment deposition, and non-ag. runoff to protect properties, waters, and other natural resources
[§ 62.1-44.15:24.; § 62.1-44.15:27 (B)(1-3).]

In Tidewater Virginia § 62.1-44.15:68

- Determine Chesapeake Bay Preservation Areas in their jurisdiction by using criteria developed by the Board [§ 62.1-44.15:74 (A).]
- Incorporate protection of water quality into comprehensive plan [§ 62.1-44.15:74 (B).]
- Incorporate protection of water quality into zoning and subdivision ordinances in Chesapeake Bay Preservation Areas [§ 62.1-44.15:74 (C,D).]

What VESMP Authorities Must Do:

- Administer a VESMP management program to:
 - Develop ordinances, policies, and technical material [§ 62.1-44.15:27 (G)(1).]
 - Develop requirements for land-disturbance approvals [§ 62.1-44.15:27 (G)(2).]
 - Review and approve erosion and sediment control plans for land disturbing activities of 10,000 sqft or more or 2,500 sqft or more for a Chesapeake Bay Preservation Act locality [§ 62.1-44.15:27 (G)(3).]
 - Certify a person responsible for carrying out the plan (“the responsible person”) [§ 62.1-44.15:27 (G)(3).]
 - Develop requirements for plan review, inspections, and enforcement [§ 62.1-44.15:27 (G)(3).]
 - Design a fee to defray cost of program for activities not included in statewide fee schedule– no public hearing needed and must be reasonable [§ 62.1-44.15:27 (G)(4).]
 - Create provisions for long-term responsibility for managing quality and quantity of runoff [§ 62.1-44.15:27 (G)(5).]

- Create provisions for coordination of VESMP with other programs that require compliance prior to authorizing a land disturbance, such as flood insurance or flood management program [§ 62.1-44.15:27 (G)(6).]
- Acquire Board approval for VESMP [§ 62.1-44.15:27 (H).]
- Obtain evidence of Virginia Pollutant Discharge Elimination System permit coverage from DEQ online reporting system, when required, prior to authorizing land disturbance [§ 62.1-44.15:27 (J).]
- If implementing a VESMP in conjunction with DEQ, forward applications to DEQ and await its determination before issuing approval [§ 62.1-44.15:34 (A)(2).]
- Adopt penalties for violations of program [§ 62.1-44.15:48 (B)(2), [§ 62.1-44.15:49 (B)(2).]

What VESMP Authorities Operated by Localities Can Do:

- Coordinate with neighboring VESCPs and VESMPs for multijurisdictional projects [§ 62.1-44.15:34 (D); § 62.1-44.15:55 (A).]
- Require changes to an approved plan when:
 - (1) Inspection reveals the plan is actually inadequate
 - (2) Responsible person finds they cannot implement the approved plan [§ 62.1-44.15:34 (B) (1,2).]
- Identify “erosion impact areas” and require erosion and sediment control plans for said lands [§ 62.1-44.15:34 (C).]
- Require the responsible person to monitor and report on the plan’s application and effectiveness [§ 62.1-44.15:27 (G)(3).]
- Take compliance measures (e.g., issue a notice with instructions for reestablishing compliance; issue a stop work order; require immediate compliance when a land disturbance occurs without prior approval; and issue a consent order to violators) [§ 62.1-44.15:37 (A,B).]
- Enter into agreements with districts, adjacent localities, and public or private entities to assist with plan review and inspections [§ 62.1-44.15:27 (I).]
- Reasonably enter public or private property to enforce this law [§ 62.1-44.15:39.]
- Adopt stricter ordinances than the regulations of the Board, if the VESMP authority can show they are necessary [§ 62.1-44.15:33 (A).]
- Make the area threshold for land disturbance regulation smaller [§ 62.1-44.15:34 (E)(2), 62.1-44.15:34(E)(3).]
- Issue an order requiring the establishment of a sewer system, per procedures of 15.2-2122(10)(a) [§ 62.1-44.15:37.]
- Preclude the onsite use of a Board-approved Best Management Practice (BMP), or require more stringent conditions (can be appealed to DEQ, and then again appealed to Board) [§ 62.1-44.15:33 (C)(1).]
- Preclude jurisdiction-wide Board approved BMP upon the request of an affected landowner [§ 62.1-44.15:33 (C)(2).]
- Keep ordinances pre-dating this law if they meet or exceed the minimum standard [§ 62.1-44.15:33 (E).]

- Require applicant to submit a bond, cash escrow, letter of credit, or combination, to be used by the VESMP in the event the VESMP needs to take actions to correct compliance at the applicant's expense [§ 62.1-44.15:34 (A)(4).]

What VESCP Authorities Must Do:

- Establish provisions for coordination of VESCP with other programs that require compliance prior to authorizing a land disturbance, such as flood insurance or flood management program [§ 62.1-44.15:54 (D).]
- Acquire Board approval for any related ordinances a VESCP adopts [§ 62.1-44.15:54 (C).]
- Review and approve erosion and sediment control plans for land disturbing activities [§ 62.1-44.15:55 (B).]
- Obtain evidence of Virginia Pollutant Discharge Elimination System permit coverage from DEQ's website while reviewing plan, if said permit is required [§ 62.1-44.15:57.]
- Inspect land-disturbing activities periodically [§ 62.1-44.15:58 (A).]

What VESCP Authorities Can Do:

- Establish an administrative fee structure for the program (public hearing required) [§ 62.1-44.15:54(F)]
- Adopt penalties for violations of program [§ 62.1-44.15:54 (G).]
- Coordinate with neighboring VESCPs and VESMPs for multijurisdictional projects [§ 62.1-44.15:55 (A).]
- Require changes to an approved plan when:
 - (1) Inspection reveals the plan is actually inadequate
 - (2) The person responsible cannot meet the approved plan[§ 62.1-44.15:55 (C)(1,2).]
- Identify "erosion impact areas" and require erosion and sediment control plans for said lands [§ 62.1-44.15:55 (D).]
- Require the person responsible to monitor and report on the plan's application and effectiveness [§ 62.1-44.15:58 (A).]
- Take compliance measures (e.g., provide notice with instructions for reestablishing compliance; issue a stop work order; and require immediate compliance when a land disturbance occurs without prior approval) [§ 62.1-44.15:58 (A,C).]
- Enter into agreements with districts, adjacent localities, and public or private entities to assist with its responsibilities [§ 62.1-44.15:58 (B).]
- Reasonably enter public or private property to enforce this law [§ 62.1-44.15:60.]
- Adopt stricter ordinances than the regulations of the Board, if the VESCP can show they are necessary [§ 62.1-44.15:65 (A).]
- Make the area threshold for land disturbance regulation smaller [§ 62.1-44.15:55 (F)(1).]

VSMP:

- Administered by the Board when a locality makes choice not to administer own VESMP [§ 62.1-44.15:27.1 (A).]
- Covers disturbances of than one acre or more, or disturbances less than one acre that are part of a plan of development of 1 acre or more [§ 62.1-44.15:27.1 (A)(1).] (Note: Functionally, this leaves localities that select a VESCP to ensure stormwater compliance for land disturbances below 1 acre and 10,000 sqft or more, or 2500 sqft or more in Chesapeake Bay Preservation Areas)

What DEQ Must Do:

- Support VESMP and VESCP authorities with: training and technical assistance; assistance in establishing program; and developing model ordinances [§ 62.1-44.15:27 (E),(F).]
- Establish training and certification program for stormwater management plan administrators, inspectors, and reviewers [§ 62.1-44.15:30 (A), (B),(D).]
- Assist with plan responsibilities when a non-MS4 locality that opts out of VSMP does not yet have a certified stormwater management plan reviewer, until such training and certification has been obtained when the locality is operating a VESMP in conjunction with DEQ or chose not to administer a VESMP [Enactment Clause (5-6).]
- Determine if current and planned fee structures are sufficient and hold a Stakeholders Advisory Group meeting to review and evaluate this assessment [Enactment Clause (8).]

What State Water Control Board Must Do:

- Adopt regulations for the purpose of this Act, exempt from the requirements of the Administrative Process Act after DEQ: 1) provides a Notice of Intended Regulatory Action, 2) forms a stakeholders advisory group, 3) provides a 60 day public comment period, and 4) provides the Board with a written summary of comments and their responses [§ 62.1-44.15 (10); Enactment Clause (9).]
- Evaluate and approve VESMPs and VESCPs [§ 62.1-44.15:27 (H); § 62.1-44.15:52 (D).]
- Establish a statewide fee structure to cover costs of VESMP stormwater management requiring permit coverage and of land disturbing activities where the Board serves as a VESMP authority or VSMP authority [§ 62.1-44.15:28 (9).]
- Administer a VSMP for any locality that chose a VESCP [§ 62.1-44.15:27 (3).]
- Establish regulations requiring VESMPs to make runoff after a land-disturbance equal to or better than it was before the disturbance [§ 62.1-44.15:28 (13).]
- Encourage efforts to control stormwater through low impacts designs, nonstructural means, and regional and watershed approaches [§ 62.1-44.15:28 (14).]
- Promote reclamation and reuse of stormwater to purposes other than drinking [§ 62.1-44.15:28 (15).]

- Establish procedures for a locality to change its programs [§ 62.1-44.15:28 (16).]

What the State Water Control Board Can Do:

- Provide information to local, state, and regional governments regarding land use, development, and water quality [§ 62.1-44.15:69 (1).]
- Consult, advise, and coordinate with state and local governments; and federal, state, regional, and local agencies [§ 62.1-44.15:69 (2).]
- Provide financial and technical assistance to local governments; and regional and state agencies [§ 62.1-44.15:69 (3).]
- Develop procedures for use by local governments to designate Chesapeake Bay Preservation Areas [§ 62.1-44.15:69 (7).]
- Ensure that local government comprehensive plans, zoning ordinances, and subdivision ordinances are in accordance with this law [§ 62.1-44.15:69 (8).]
- Adopt regulations to be met by a VESMP that shall regulate storm water and erosion, during and after land disturbance [§ 62.1-44.15:28.]
- Enforce compliance measures (e.g., a notice with instructions for reestablishing compliance; issue a stop work order; and require immediate compliance when a land disturbance occurs without prior approval) [§ 62.1-44.15:37]
- Reasonably enter public or private property to obtain information and conduct surveys for the purposes of this law [§ 62.1-44.20.]
- Perform any other duty or responsibility related to the use and development of land, and protection of water quality, per the Secretary's assignment [§ 62.1-44.15:69 (11).]

VESMP Enforcement Procedures:

Who will face Civil Penalties?

- Anyone who violates the law, regulations, or standards and specifications approved by the Board [§ 62.1-44.15:48(A-B).]
- Anyone who doesn't comply with an order of the Board or court under this law [§ 62.1-44.15:48(A-B).]

If violation occurs for a land-disturbing activity, then:

- Person responsible for agreement in lieu of a plan must (1) correct violation, and (2) provide name of the person holding the "Responsible Land Disturber certificate" [§ 62.1-44.15:34 (A).]
- Owner subject to reversal of approval and penalties if information is not provided prior to land-disturbance [§ 62.1-44.15:34 (A).]

If failure to apply for approval, or failure to comply with land disturbance approval occurs, VESMP authority or Board can:

- Give notice for compliance to owner, permittee, or person conducting land-disturbance, including specification of compliance or plan approval measures, and a reasonable timeline to comply [§ 62.1-44.15:37 (A).]
- Enter property or establishment to initiate or maintain compliance actions [§ 62.1-44.15:39, § 62.1-44.20.]
- Count the days of noncompliance as days of violation if enforcement measures are taken [§ 62.1-44.15:37 (A).]
- Issue “stop work order” to cease all land-disturbing activities until compliance is met [§ 62.1-44.15:37 (B).]
- Start court proceedings for an injunction or other remedies [§ 62.1-44.15:37 (E)(5).]

If “reasonable performance bond” was required prior to land-disturbance approval, then VESMP authority:

- Can collect the difference (if bond is more than cost of action) if applicant fails to comply after proper notice [§ 62.1-44.15:34 (A)(4).]
- Must refund the bond amount to applicant or terminate the bond after 60 days from the completion of the permit. [§ 62.1-44.15:34 (A)(4).]

VESCP Enforcement Procedures:

Who will face Civil Penalties? (Note: VESCP’s are not required to enact these provisions)

- Anyone who violates any regulation or order of the Board, the provisions of the VESCP’s program, or any condition of land-disturbance approval [§ 62.1-44.15:54. (G)]

If violation occurs for a land-disturbing activity, then:

- Person responsible for agreement in lieu of plan must (1) correct violation, and (2) provide name of the person holding the certificate of who is responsible and in charge of “carrying out the land-disturbing activity” [§ 62.1-44.15:55 (B).]
- Person also subject to reversal of approval and penalties if information is not provided prior to land-disturbance [§ 62.1-44.15:55 (B).]

If failure to apply for approval, or failure to comply with land disturbance plan, VESCP authority can:

- Give notice of compliance to owner or “person responsible for carrying out the land-disturbing activity,” including specification of compliance or plan approval measures, and a reasonable timeline to comply [§ 62.1-44.15:58 (A).]

- Enter property or establishment to initiate or maintain compliance actions [§ 62.1-44.15:60.]
- Count the days of noncompliance as days of violation if enforcement measures are taken [§ 62.1-44.15:58 (A).]
- Issue “stop work order” to cease all land-disturbing activities until compliance is met [§ 62.1-44.15:58 (C).]
- Start court proceedings for an injunction or other remedies, if person does not comply with the terms of the notice or emergency order, and person in violation can face civil penalties in accordance with § 62.1-44.15:54 [§ 62.1-44.15:63.]

If “reasonable performance bond” was required prior to land-disturbance approval, then VESCP authority:

- Can collect the difference (if bond is more than cost of action) if applicant fails to comply after proper notice [§ 62.1-44.15:57.]
- Must refund the bond amount to applicant or terminate the bond after 60 days from the completion of the permit [§ 62.1-44.15:57.]

FINAL NOTE

This Programmatic Summary Sheet examines the entirety of HB1250/SB673 and the provisions contained therein. It is important to note that the new bill incorporates a number of programmatic provisions, standards, requirements, etc., which exist under current Virginia law governing stormwater management and erosion and sediment control; thus, all of the provisions of the new bill and all of the provisions summarized herein are not “new” law.

APPENDIX D



Questionnaire/Delegate Hodges Stormwater Project Re: HB 1250/SB 673

Name:

Organization:

- 1) Please describe your organization and your position within it.
- 2) Per the revisions of HB 1250/SB 673, §62.1-44.15:27 provides the choices available to localities for selecting their erosion and sediment control and stormwater programs.

In your opinion what opportunities or difficulties does § 62.1-44.15:27 create?
What solutions do you propose for any of these difficulties?

- 3) Per the revisions of HB1250/SB 673, § 62.1-44.15:52 provides the choices available to localities who have elected not to administer their own stormwater management program. This section maintains the prior standards for any plans approved before July 1, 2014.

In your opinion what opportunities or difficulties does § 62.1-44.15:52 create?
What solutions do you propose for any of these difficulties?

- 4) In your opinion, what are the particular ramifications of these provisions to Chesapeake Bay Preservation Act localities or those working in them?
- 5) What role does your organization play in the design or implementation of the programs under this law? How would you define that role?

Does your organization need resources to fulfil that role?

- 6) Do you have any other significant, substantive concerns about the new law outside the ones we have discussed? If so, what solutions do you proposed to address these concerns?
- 7) Do you have any questions for us?

APPENDIX E

Prepared by: Virginia Department of Environmental Quality
629 E. Main Street
Richmond, Virginia 23219
(804) 698-4000

STORMWATER MANAGEMENT FACILITY MAINTENANCE AGREEMENT

THIS AGREEMENT is made this _____ day of _____
20_____, by and between _____ (the
Owner), and the Virginia Department of Environmental Quality (the Department).

WITNESSETH:

WHEREAS, the Owner is the owner of certain real property in
_____ County, Virginia, Tax Map Parcel Number(s) _____, as
recorded by deed in the land records of _____ County, Virginia at Deed
Book _____, Page _____ (the Property);

WHEREAS, the Department currently is the Virginia Stormwater
Management Program (VSMP) Authority for _____ County;

WHEREAS, the Property is being developed into a project known and
designated as _____, as shown
and described on the stormwater management plan for the Property dated
_____, 20_____, and revised through
_____, 20_____ (the Plan), a copy of which is attached
hereto as Exhibit A;

WHEREAS, the Plan includes one or more permanent stormwater management facilities (the Facility) to control post development stormwater runoff from the Property; and

WHEREAS, to comply with § 62.1-44.15:28 of the Code of Virginia and the attendant regulations pertaining to this project, the Owner agrees to maintain the Facility in accordance with the Maintenance Plan dated _____, 20_____, and revised through _____, 20_____ (the Maintenance Plan), a copy of which is attached hereto as Exhibit B.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants contained herein, the receipt and sufficiency of which are acknowledged hereby, and in accordance with the following terms and conditions, the parties agree as follows:

1. The Department and its agents may enter the Property to perform periodic inspections to ensure the proper maintenance and functioning of the Facility. These inspections will be conducted at reasonable times. Whenever possible, the Department will notify the Owner prior to entering the Property. If the Department finds that repairs must be undertaken to return the Facility to the original design, as shown and described in the Plan, the Owner shall complete any such repairs within thirty (30) calendar days of the inspection or a longer period as approved by the Department.

2. The Owner, at the Owner's sole expense, shall construct the Facility in accordance with the Plan, and shall provide to the Department a construction record drawing for the Facility prior to termination of coverage under the General

VPDES Permit for Discharges of Stormwater from Construction Activities, also known as the “Construction General Permit”.

3. The Owner, at the Owner’s sole expense, shall maintain and repair the Facility in perpetuity and in a manner which will enable the Facility to remain in compliance with the Virginia Stormwater Management Program Regulations and the Facility’s original standards, as shown and described in the Plan and Maintenance Plan. The Owner shall keep written maintenance and repair records and provide copies to the Department upon request.

4. The Owner, at the Owner’s sole expense, shall inspect the Facility according to the schedule set forth in the Maintenance Plan. These inspections shall be conducted by a person who is licensed as a professional engineer, architect, landscape architect, or land surveyor pursuant to Article 1 (§ [54.1-400 et seq.](#)) of Chapter 4 of Title 54.1 of the Code of Virginia; a person who works under the direction and oversight of a licensed professional engineer, architect, landscape architect, or land surveyor; or a person who holds an appropriate certificate of competence from the State Water Control Board. If the inspector finds during an inspection that repairs must be undertaken to return the Facility to the original design as shown and described on the Plan, the Owner shall complete any such repairs within thirty (30) calendar days of the inspection or a longer period as approved by the Department. The Owner shall keep written inspection records and provide copies to the Department upon request.

5. The Owner shall provide a right of ingress and egress for the Department and its agents to perform the periodic inspections referenced above and to undertake or have undertaken maintenance and repair of the Facility, if such maintenance is deemed necessary by the Department and not adequately

completed by the Owner. It is expressly understood and agreed that the Department is under no obligation to maintain or repair the Facility. The Owner shall reimburse the Department for all maintenance and repair costs within thirty (30) calendar days after receiving a demand for reimbursement. The Owner acknowledges that the Department may take any other enforcement actions as may be available at law.

6. The Owner shall save, hold harmless, and indemnify the Department and its agents against all liability, claims, demands, costs and expenses arising from, or out of, the Owner's failure to comply with the terms and conditions set forth herein, or arising from acts of the Owner related to the construction, operation, maintenance or repair of the Facility.

7. This Agreement shall constitute a covenant running with the land and shall inure to the benefit of and shall be binding upon the parties hereto, their respective heirs, successors and assigns, including, without limitation, any subsequent VSMP Authority for _____ County and all subsequent owners of the Property, as well as any property owner's association or similar organization responsible for maintenance of the Facility. This Agreement shall be described in full or incorporated by reference into each deed of conveyance out of the Property. The Owner shall notify the Department in writing within 30 days of conveying any interest in the Property affecting the ownership or responsibility for maintenance of the Facility.

8. Upon execution of this Agreement, it shall be immediately recorded in the Clerk's Office of the Circuit Court of _____ County, Virginia, at the Owner's sole expense. A copy of the recorded agreement shall be provided to the Department within 30 days of recordation. The Owner also



stipulates, by this Agreement, that final plats for any land on which the Facility and/or a portion of the Facility is situated will include a reference to this Agreement and to its location in the land records of _____ County, Virginia.

IN WITNESS WHEREOF, the Owner and the Department have caused this Agreement to be signed in their names by their duly authorized representatives as of the date first set forth above.

_____, Owner

By: _____
Name/Title

Virginia Department of Environmental Quality

By: _____
Name/Title

COMMONWEALTH OF VIRGINIA
COUNTY OF _____, to-wit:

The foregoing instrument was acknowledged before me this ____ day of _____, 20__, by _____ in [his/her] capacity as _____ for _____, the Owner.

_____[SEAL]
Notary Public

My Commission Expires: _____

Notary Registration Number: _____

The foregoing instrument was acknowledged before me this ____ day of _____, 20__, by _____ in [his/her] capacity as _____ for the Virginia Department of Environmental Quality.



_____ [SEAL]

Notary Public

My Commission Expires: _____

Notary Registration Number: _____